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In The

# Supreme Court of the United States

UNITED STATES POSTAL SERVICE,

*Petitioner,*

v.

FLAMINGO INDUSTRIES (U.S.A.) LTD.
AND ARTHUR WAH,

*Respondents.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## BRIEF OF POSTALWATCH INCORPORATED AS *AMICUS CURIAE* SUPPORTING RESPONDENTS

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## INTEREST OF *AMICUS CURIAE*[1]

PostalWatch Incorporated ("PostalWatch") is a not-for-profit Virginia corporation organized in 1999, and exempt from income tax under § 501(c)(4) of the Internal Revenue Code. The principal functions of PostalWatch are to monitor, report to the public and policymakers on, and comment upon the operations, regulatory actions and competitive activities of the United States Postal Service. PostalWatch seeks to encourage honesty, efficiency, and responsiveness to public needs on the part of the Postal Service. PostalWatch seeks to discourage wasteful, unnecessary and anticompetitive activities by the Postal Service, which could stifle and distort competition across broad areas of the economy.

## SUMMARY OF ARGUMENT

The issue in this case has broader dimensions and implications than either party has explicitly or fully addressed, or the Ninth Circuit fully explicated.

USPS has become a commercial entity, an economic person, with actual and potential effects on many markets, not merely those affected by procurement decisions. In broader context, in its current form and in essential function, USPS is part of a large and progressively proliferating set of

[1] PostalWatch files this brief with the consent of all parties. The letters granting consent have been filed with the Court. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than PostalWatch or its counsel, make a monetary contribution to the preparation or submission of this brief.

communications and transportation services available to the public. Such services do not require sovereign status for their provision.

Increasingly beset by direct and indirect competition, USPS has expanded into lines of commerce beyond the scope of those mandated it by Congress. However, the protections from competition currently provided USPS's mail delivery functions afford it unique opportunities to stifle and distort competition in markets directly related to mail delivery and in other communications and transportation services. Any broad status-based exemption from the antitrust laws for activities outside its congressionally mandated mail delivery function, in any line of commerce, would create broad anticompetitive potentials subject to no adequate check.

The antitrust laws embody the fundamental national policy in favor of a competitive economy, which is to be given the broadest feasible applicability. The construction of Congress's specification that the Postal Service may "sue and be sued" to allow applicability of the antitrust laws to anticompetitive USPS activity, while maintaining "conduct based" antitrust immunity tailored to the precise contours of Congress's grant of a charter to perform mail services with an attendant monopoly, would effect a necessary and appropriate accommodation of relevant policies – indeed, the only rational resolution under current conditions.

The rationales for exemption from the antitrust laws offered by the Solicitor General on behalf of the Postal Service have little weight, are self-serving, and are inconsistent with its own administrative practice.



## ARGUMENT

### I. USPS is a substantial, competitive commercial person that fiercely competes in a number of markets, though it persistently seeks to deny that status and don the cloak of sovereignty to avoid restraints on anticompetitive conduct.

The Postal Reorganization Act of 1970 (PRA) specifically formulated the Postal Service as to operate less as a government entity and more along the lines of a business. Several features of that architecture, with which PostalWatch has become familiar in its observations of the USPS's operation, should be appreciated to give adequate scope to this formulation under current conditions.

The Act set up a Board of Governors, which is analogous to a Board of Directors, under which functions, a chief executive officer – the Postmaster General.

The Service was to recover its operating expenses from charging postage fees for its services in the market, rather than to be funded by congressional appropriations. Though it was allowed to borrow from the Treasury, the legislative design clearly mandated the Service be self-sustaining and breakeven over time.

The rates of the USPS are governed in a fashion similar to the practice in regulated industries where limited grants of monopoly have been allowed commercial entities – that is, through the use of a rate-reviewing commission: in this case the Postal Rate Commission. The scope of this Commission's authority is currently, however, more limited than those of traditional regulatory agencies, in that it operates largely in an advisory capacity.

In support of the business-like formulation, Congress freed the Postal Service from direct Executive Branch influence. In addition, Congress mandated that USPS be self-sustaining and thus divorced from the Congressional controls inherent in the appropriations process. In further support of the business-like formulation, the PRA took USPS off-line from normal agency-like oversight and removed it from "Agency" status as defined in the Administrative Procedure Act (APA).[2]

> Application of other laws (a) Except as provided by subsection (b) of this section, and except as otherwise provided in this title or insofar as such laws remain in force as rules or regulations of the Postal Service, no Federal law dealing with public or Federal contracts, property, works, officers, employees, budgets, or funds, including the provisions of chapters 5 and 7 of title 5, shall apply to the exercise of the powers of the Postal Service.[3]

The USPS exemption from the Administrative Procedure Act, taken with the APA's distinction between those entities subject to its scope (agencies), and those not (persons), suggests that the USPS should be treated as a "person" rather than an "agency" in the situation presented this Court.

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[2] 5 U.S.C. § 551 – Definitions – (1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include ... (2) "person" includes an individual, partnership, corporation, association, or public or private organization other than an agency.

[3] 39 U.S.C. § 410 – Application of other laws.



The USPS values and frequently exploits its non-agency personhood, regularly claiming the status and characteristics of a commercial entity where that is to its advantage.

In claiming exemption from the Administrative Procedures Act, USPS does not comply with the Paperwork Reduction Act or the Small Business Regulatory Flexibility Act. USPS regularly claims to be exemption from agency rulemaking notice and comment requirements and is not required to adhere to normal governmental purchasing procedure and controls.[4]

The Service regularly denies[5] Freedom of Information Act (FOIA) requests, citing a FOIA exemption[6] for "information of a commercial nature."

The USPS regularly registers its trademarks and copyrights, has abandoned its governmental www.usps.gov web address in favor of the commercial www.usps.com and regularly sells, licenses or otherwise profits from the commercialization of its intellectual property. It generates tens of millions of dollars from the licensing of its change-of-address database, address correction data and stamp artwork for commercial reproductions sold to the public.

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[4] See Wickwire Gavin, *What are the major differences between USPS's purchasing regulations and those of other federal agencies? at* http://www.wickwire.com/practice/postal/postalfaqs.htm#dozen.

[5] For the USPS's perspective on its FOIA exemption see: Postal Rate Commission, *Substantive Comments of the United States Postal Service*, PRC Docket No. RM2003-3 (July 2, 2003) *available at* http://www.prc.gov/docs/38/38562/Substantive.comments.final.rev.doc.

[6] 39 U.S.C. § 410(c)(2).

Taking all these factors and others into account, the General Accounting Office has characterized the Postal Service as a "corporation-like organization".[7]

It is true, as the Solicitor General suggests in his brief that in 1970 Congress surely intended that the USPS continue a service widely depended upon by the general public. It is also true that the USPS is limited to a significant degree in its management discretion as to facilities, rates and other matters directly related to its letter-mail monopoly. These limitations are largely symmetrical with and counterbalanced by its protections from competition.[8]

These factors recognized, it is obvious that Congress moved in the direction of making the Postal Service operate along the lines of commercial enterprises, and in doing so waived sovereign immunity for commercial conduct. As the 9th Circuit Court observed, in this context the "sue and be sued" clause of U.S.C. 39 should be compelling evidence of Congressional intent that the USPS respond to those laws which generally govern commerce in the United States.

The USPS's effort in this court to remove itself from constraints on anticompetitive conduct by asserting that it

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[7] General Accounting Office, *U.S. Postal Service Issues Related to Corporate Governance*, GAO Report No. GGD-97-141, at 2 (August 1997).

[8] Whether these symmetries and counterbalances in fact work out well in an increasingly diverse and competitive United States market is by no means currently clear or assured in the future. This version of the "regulatory compacts" long prevalent in the United States may be unsustainable, as has occurred in other areas. Hence current policy debates on the future of the postal monopoly.



is not a "person" continues a consistent course of action that has been rejected by several lower courts.

The 6th Circuit Appeals Court in *Federal Express Corporation v. United States Postal Service*, 151 F.3d 536 (6th Cir. 1998) observed a recurring pattern of behavior:

> As previously indicated, this circuit adopts the well reasoned decisions of the Fourth and Eighth Circuits, which refute USPS's contention that it is not a "person" accountable for its misdeeds proscribed by the Lanham Act. In its arguments, the Postal Service has illustrated a penchant of some federal government agencies and officers to proactively seek the benefits and protections afforded by the law while simultaneously endeavoring to avoid the responsibilities and burdens imposed by legal restraints and standards of conduct, which constrain others. In this case, despite its apparent vigorous participation, as a quasi-private enterprise, in roiling free market competition with private sector commercial document carriers, the Postal Service has hastily elevated the shield of governmental privilege when accused of competitive wrongdoing. . . . Congress did not intend to launch [USPS] into the commercial world and also to immunize USPS from liability for federally-created commercial torts such as the Lanham Act.

In rejecting similar immunity claims in the 1998 tort action *Global Mail Ltd. v. United States Postal Service,* 142 F.3d 208 (4th Cir. 1998) the Fourth Circuit concluded,

> USPS is not an enterprise that occasionally affects commercial firms indirectly in its endeavors. Rather, the language and the legislative history of the PRA make clear that Congress intended USPS

> to be a full-fledged competitor in the business of carrying letters, parcels and packages, and USPS has fulfilled that intention by competing head-to-head with a host of private courier services. . . . In sum, we hold that § 409(c) does not limit the PRA's waiver of sovereign immunity such that USPS is liable in tort only for those torts cognizable by the FTCA.

The Sherman Act is designed primarily to protect competition, rather than competitors. But firms throughout the economy have a protected interest in the opportunities available in competitive, unconstrained markets. And the general public has an interest in the benefits of such free and fair competition. Such competitive opportunities and public benefits will not be available in full measure where the USPS is allowed to participate in private competitive markets yet evade antitrust strictures by denying "personhood."

## II. The Postal Service today represents but a fraction of a large and proliferating set of communication and transportation services which bind the nation together, and link the nation with others. None of these services require sovereign status for their provision.

In this proceeding, the Postal Service attempts to cast its role as "quintessentially sovereign." If that were ever the case, it is no longer the case in the today's communication and transportation environment.

When the Constitution was cast, its essence was to link together diverse states into one political and commercial entity. It therefore endowed Congress with the ability



to facilitate commerce between the States in general, including communications. Thus, in Article 1, Chapter 8, Clause 7, Congress was authorized, not directed, "To establish Post Offices and Post Roads". This was a limited grant of authority, upon which Congress expanded to create the modern-day Postal Service.

Communication capabilities were relatively limited in 1789. But during the past two centuries, means of communications have proliferated greatly. Progressively, telegraph, telephone, "facsimile", radio, television, "courier" services, and now the Internet continue to weave an ever-denser web of communications services binding the Nation together.

The Postal Service's share of this expanding communication sector was 10 percent in 2001, trending downward from nearly 12 percent in 1998.[9]

The "e-mail" feature of the Internet, taken alone, now accommodates roughly twenty-two times the message

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[9] In 2001, "Broadcasting and telecommunications" (1997-NAICS 513), "Couriers and messengers" (1997-NAICS 492), "Online information services" (1997-NAICS 514191), and the Postal Services (1997-NAICS 491110) generated revenues totaling $642.6 billion, of which USPS's $65.8 billion represented 10.2 percent. The Postal Service's share of these categories continues to trend downward from 1998 when revenues of $60.1 billion represented 11.9 percent of the combined total of $501.2 billion (NAICS code 513 includes wire-line and wireless telephony, cable TV networks and distribution, and radio and television broadcasting, NAICS 492 includes messenger services, and air and ground parcel deliverers, and NAICS 514191 includes internet service providers). U.S. Census Bureau, *2001 Service Annual Survey* (Feb. 2003) at pp. 8, 16 and 17, available at http://www.census.gov/svsd/www/sas01rpt.pdf, U.S. Postal Service *2001 Annual Report* at 21, U.S. Postal Service *1998 Annual Report* at 57.

volume of physical mail.[10] Such messages are cheaper, faster, and much more easily manipulated and disseminated than letter messages.

These communications services have generally been performed by private, rather than government, entities, in the United States.

Thus, demonstrably, it is no longer necessary that the "sovereign" perform communication services, in order to bind the nation together. There is nothing inherent in the function of transporting messages written on paper, using ink, or like materials, between private, commercial, and other parties in the United States, which uniquely requires sovereign status or sovereign immunity.

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[10] In the rapidly expanding, mutable Internet world, census data becomes quickly out of date. InfoWorld Magazine reported on September 26, 2002, an International Data Corporation study pegging worldwide e-mail message volume at 31 billion messages daily, projecting 60 billions daily by year 2006. The final report of the President's Commission on The United States Postal Service states that the approximately 200 billion pieces of mail the USPS delivers each year makes up roughly 40% of the worldwide mail volume. Thus worldwide mail volume is approximately 1.4 billion letters per day or 1/22 the global volume of e-mail. A July 18, 2003 ComputerUser.com report puts the United States share of internet traffic at about 45%. InfoWorld Magazine, *You've got mail: 60 billion a day by 2006* (September 6, 2002) at http://www.archive.infoworld.com/articles/hn/xml/02/09/26/020926hnemail6b.xml?s=IDGNS; International Data Corporation, *Worldwide Email Usage Forecast, 2002-2006*, IDC Doc #27975 (September 2002) at http://www.idc.com/getdoc.jhtml?containerId=27975&pid=35178981, President's Commission on The United States Postal Service, *Embracing the Future*, at 18 (July, 2003) *available at* http://www.treas.gov/offices/domestic-finance/usps/pdf/freport.pdf, ComputerUser.com, *Study – 55 percent of world's Web traffic non-U.S.* (January 25, 2001) *at* http://www.computeruser.com/news/01/01/25/news6.html.



Indeed, mounting competitive pressures on USPS have put in question its continued viability in its current form. This, and a worldwide tendency toward deregulation and privatization of functions historically performed or regulated by government entities,[11] has led to considerable scholarly discussion on needs to reorganize USPS, including suggestions that the postal monopoly should be abolished.[12]

Various legislative "reform" proposals have been offered in Congress in recent years. A Presidential Commission empanelled to study the USPS has recently issued its report[13] and recommendations, which will undoubtedly be followed by new legislative initiatives.

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[11] Recognizing a reduced dependence on hard-copy communications and the changing needs of their citizenries, many industrialized nations around the world are making significant strides in liberalizing and de-monopolizing their, once perceived to be necessarily governmental, postal and telecommunication authorities. For a brief overview demonstrating the trend towards liberalization and de-monopolization of foreign postal administrations see The President's Commission on the United States Postal Service, *Statement of James I. Campbell*, at 22 (February 20, 2003), *available at* http://www.treas.gov/offices/domestic-finance/usps/testimony-docs/campbell.pdf.

[12] See, for example, Peter J. Ferrara, *Free the Mail: Ending the Postal Monopoly*, Cato Institute (1989); Rick Geddes, *Neither Snow Nor Sleet . . . Can Dampen This Monopoly*, Hoover, Digest No. 2, 2000, (2000) *available at* http://www-hoover.stanford.edu/publications/digest/002/geddes.html.

As to protecting competitors from extension of the USPS monopoly into competitive lines of commerce, see Sidak and Spulber, *Protecting Competition From the Postal Monopoly*, AEI Press (1996).

[13] President's Commission on The United States Postal Service, *Embracing the Future* (July, 2003) *available at* http://www.treas.gov/offices/domestic-finance/usps/pdf/freport.pdf.

All this is not to say that traditional mail services are not a significant service. Though economic forces press increasingly hard on the historically evolved postal service structure, necessary institutional adaptations will be carefully and contentiously hammered out. The historically developed expectations of mail service by individual citizens and various constituencies, such as commercial mass mailers, will condition the pace and scope of change in the ways mail services will be defined and delivered in the future.

Our basic point is this: the imperial robes in which the USPS has garbed itself in this proceeding, as a sovereign entity performing a uniquely sovereign set of services, are, in economic terms, in today's communications markets, diaphanous. Workable law related reasonably to economic reality, we suggest, cannot be premised off the USPS's time worn, self-serving, increasingly transparent pretensions.[14]

## III. USPS seeks impermissible blanket immunity from the antitrust laws for anticompetitive conduct in any and all lines of commerce.

The USPS has traditionally offered parcel post and other "special" services, as non-monopoly, "non jurisdictional" or "non-postal" services competitive with private sector services.

[14] For a perceptive economics oriented perspective on the antitrust law issues presented in this case see, Michel Schuyler, *Antitrust Law and the Postal Service*, Institute for Research on the Economics of Taxation (August 25, 2003) at ftp://ftp.iret.org/pub/ADVS-159.PDF.



As alternative technology, communication and transportation markets have evolved – particularly e-mail – and USPS revenues have been subjected to increasing competitive pressure, the USPS has responded by attempting to develop services of the sort used by its direct and indirect competitors. One illustrative example is USPS eBillPay and Send Money, which provides USPS-branded bill presentment services and person-to-person transfers and bill payments with electronic cash transfers.

Recently Consumer Action, a California based consumer watchdog organization, joined by the Postal Rate Commission's Office of Consumer Advocate, has petitioned[15] the Postal Rate Commission to inquire into the financial results of such initiatives. In its petition, Consumer Action lists fourteen services about which it is concerned. Postal management's response in PRC Docket *2003 furnishes the most recently available public catalogue of USPS's "non-jurisdictional" initiatives,[16] beyond its traditional mail service programs.

We think it fair to say that at this point USPS's initiatives are exploratory and in the process of evolution. It is also fair to say that USPS clearly seeks to expand upon the scope of services directly and clearly authorized by Congress.

[15] Postal Rate Commission, *Petition of Consumer Actions for Review of Unclassified Services*, PRC Docket *2003, (10/15/2002) *available at* http://www.prc.gov/dockets.asp?node=dbt&ID=%2A2003.

[16] Postal Rate Commission, *Comments of United States Postal Service on Consumer Action Petition*, PRC Docket *2003 (1/30/2003) *available at* http://www.prc.gov/docs/36/36904/USPSComments_CA-OCA_Petn.pdf.

Such initiatives raise a host of significant competitive issues, which will be addressed for years to come.

PostalWatch is concerned about issues of "fair competition." These include issues raised by USPS's clear desire to exploit the best of both worlds – the use of a governmental grant of market protections and claims of "sovereign" status, as well as preferential access to Treasury financing, while aggressively pursuing commercial aims far in excess of its statutory charter. PostalWatch is concerned about issues of cross subsidization, deceptive advertising, dissipation of postal revenues on ill conceived and poorly executed adventures beyond basic postal services, disincentives to economy and efficiency resultant from market protections, and similar issues. Consumer Action and the Postal Rate Commission's Office of Consumer Advocate are apparently concerned about cross subsidization and income dissipation issues, as well.

Private sector vendors of information services are concerned about the effects of a protected monopoly entering competition with them. In a recent filing with the Postal Rate Commission, the Computer and Communications Industry Association (CCIA) points out that the Postal Service has discussed plans to assign e-mail addresses to all Americans or all physical addresses, to take control of the .us web domain, and to deploy computer kiosks in all post offices for sending and retrieving e-mail. CCIA fears more.[17]

[17] In its filing, CCIA quotes former Postmaster General William Henderson articulating the Postal Service's vision, in a published interview, as follows.

(Continued on following page)



As we read the thrust of the Presidential commission's recommendations, they are that the USPS organization be further modified along corporate lines, that its scope be limited to "products and services directly related to the delivery of letters, newspapers, magazines, advertising mail, and parcels" (Report, p. 28), that the universal service obligation be maintained substantially in current form but the USPS be given much more freedom in managing and disposing of facilities, and that the Postal Rate Commission be elevated to an independent regulatory body (termed the Postal Regulatory Board), with modernized, incentive based rate controls.

> And the next [strategy] is to leverage our own electronic infrastructure for commercial purposes. We have on every – on most every – will have on most post offices that have POS, a point-of-sale machine, a backup satellite capability . . . It now has voice and video capability, which makes it an enormous tool, a giant highway, and it's more reliable than optical fiber because we have optical fiber into the POS machines. So it's a huge asset that this organization has, that it's now looking and thinking about who – and you say who could use it? Well, anyone could use it who has a data transmission need. It's completely secure. You would just lock into the post office, and you could transmit data anywhere in the world.

Postal Rate Commission, *Comments of the Computer & Communications Industry Association on the Motion of the Office of the Consumer Advocate to Request That the Commission Institute a Proceeding to Consider the Postal/Nonpostal Character of Specified Services and the Establishment of Rules to Require a Full Accounting of the Costs and Revenues of Nonpostal Services*, PRC Docket *2003, (January 28, 2003) *available at* http://www.prc.gov/docs/36/36838/CCIA_PRC_comments.doc.

As to the scope of the postal monopoly,[18] the Presidential Commission suggested the following:

> The Commission also recommends that the Postal Regulatory Board be tasked with clarifying and administering the scope of the postal monopoly. Given the Postal Service's status both as a monopoly and a competitor, administrative authority over the monopoly should reside outside the institution. It is inappropriate for a commercial organization to decide the scope of a law that restrains its competitors. To the contrary, it is a fundamental premise of American justice that the law should be administered by persons without a financial interest in the outcome. (Report, p. 65).[19]

In issuing certiorari, this Court has undertaken to define the scope of controls external to USPS on anticompetitive conduct, under existing law. We submit that the Court should therefore, in accord with its own traditions and the fundamental concepts recognized by the Presidential

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[18] In describing to the President's Commission the scope of the postal monopoly at present, Campbell observed with acute insight "What most mailers now think of as an ancient monopoly is in truth a set of administrative regulations bearing little relationship to the acts of Congress. . . . At best, the purpose and scope of the postal monopoly law are uniquely murky." Statement of James I. Campbell, *supra*, at 21.

[19] In proposing that a Postal Regulatory Board govern the scope of the postal monopoly, the Presidential Commission did not deal in detail with all of the issues presented in this case. Such issues may – we presume will – surface in Congressional consideration of the Commission's recommendations. The scope of the regulatory authority to be given any such Postal Regulatory Board, if created, and the relationships between its functions and the application of the antitrust laws will, again, presumably, be addressed at that time.



Commission, here and now provide clear guidance that activities beyond the USPS's core monopoly are subject to judicial restraint under the antitrust laws.

Under the extremely expansive, status-based immunity the USPS seeks it would be free to engage in price fixing, market allocations, and other *per se* violations of the antitrust laws, as well as practices otherwise subject to "rule of reason analysis," in any market of its choosing, without, Congressional appropriations related oversight, any direct Executive Branch controls, any regulatory check from the Postal Rate Commission, or any judicial review under the antitrust laws. And it would be free to leverage its statutory grant of monopoly to restrain competition in any such line of commerce, without any such check.

USPS is proposing a massive overreach, based primarily on its proprietary interests rather than governmental needs.

Conceivably this Court could craft a decision on the specific facts of this case which would avoid ruling on such broad ranging matters. But the USPS has asserted such a broad status-based immunity, and the Circuit Court has crafted an approach for disposing of such a claim. If such broad issues are to be addressed, we recommend the approach taken by the Circuit Court below.

## IV. The Circuit Court's "conduct based immunity" approach is a reasonable, and necessary, means of reconciling the governmental mandate of monopoly mail delivery, and the application of the fundamental national policy of competition to conduct not within the necessary scope of that mandate.

This Court has long and consistently stated that the fundamental national economic policy of the United States is that of fostering and relying upon competitive markets. E.g., *U.S. v. Topco Assoc., Inc.*, 405 U.S. 596, 610 (1972); *Standard Oil Co. v. Federal Trade Commission*, 340 U.S. 231, 248 (1951).

The USPS argues that apart from the clear "sue and be sued" language, a plaintiff must show that there is an explicit, statutorily mandated right of action against the USPS. But the long-standing rule under the antitrust laws is that they are to be applied absent an explicit statutory immunity, or a "plain repugnancy" between the antitrust laws and any specialized regulatory scheme. See *Otter Tail v. United States*, 410 U.S. 366 (1977); *MCI Communications Corp. v. Am. Tel. & Tel. Co.*, 708 F.2d 1081 (7th Cir. 1973).

We can agree with the USPS argument that the Congress did not intend that either the government or private parties would be able to maintain actions against the USPS for exercise of its monopoly grant to perform its mandated mail delivery function and acts and practices reasonably ancillary thereto. Putting aside issues of sovereignty, particular causes of action could be plainly repugnant to the basic, specific responsibilities entrusted to the Postal Service, and the (somewhat limited) regulatory system paralleling the grant of monopoly services.



But there is no evidence that Congress intended that the USPS should be free to use the leverage provided it in its basic mail-delivery function to restrain competition in related markets,[20] or to engage in classic anticompetitive behavior to restrain competition in any other sector of the economy which it might choose to enter.

PostalWatch submits that little reflection is required to see that the Postal Service's argument for blanket status-based antitrust immunity for any actions, in any line of commerce, attendant to its claim of "sovereign" status, would lead to absurd and impermissible results. The Postal Service would be free to use the force of government, acting as a "sovereign", to extend its monopoly scope, and to cartelize markets in its own interests, and in the essentially commercial interests, which it shares with actual and potential competitors.

Thus, it appears to us, taking into account the larger scope of competitive issues we have attempted to outline,

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[20] For example, the Postal Service recently attempted to use its ability to withhold mail to control competition between itself and private mailbox stores, and between such private stores and "business center" operations. USPS engaged in a classic price related agreement among competing entities to structure competition in such markets. Notwithstanding the USPS's arguments to the contrary, we do not think USPS's statement of justifications would survive review under the antitrust laws in a judicial proceeding. See 39 C.F.R. 111 – D042.2.6 – *Domestic Mail Manual – Delivery to CMRA*. The USPS's own Office of Inspector General found Postal Management's actions to lack any adequate evidentiary basis. See: U.S. Postal Service Office of Inspector General, *Review of the Revised Rules Governing Commercial Mail Receiving Agencies*, Audit Report DE-AR-01-002, (April 9, 2001) *available at* http://www.uspsoig.gov/foia_files/DE-AR-01-002%20%20Revised%20Rules%20Governing%20Commercial%20Mail%20Rece.pdf.

one is necessarily led to the view of the Ninth Circuit, to the effect that Courts can, and must, distinguish between those restraints which might be imposed by the Postal Service which are directly and properly attendant to whatever grant of monopoly service Congress may have accorded the Postal Service, and those which are not reasonably ancillary to such monopoly services.

The Circuit Court's invocation of the "conduct based immunity" doctrine aptly integrates deference to the scope of the monopoly currently given the USPS, and the deference to be given to the policy and provisions of the antitrust laws.

## V. The practical, or operational, justifications offered for antitrust immunity lack evidentiary basis, are self-serving as to USPS's proprietary interests, and are inconsistent with USPS's own management practices.

The USPS arguments that it should not be burdened by the costs of litigation to determine whether its practices beyond the necessary scope of mail delivery are anticompetitive would be offered by any private firm seeking to avoid constraint on anticompetitive conduct, and can have little weight. Litigation costs are the necessary attendant to judicial review to preserve competition in the economy as a whole, and may be minimized by avoiding anticompetitive conduct.

Any argument that the USPS would suffer great burdens in distinguishing between its basic mail delivery functions and other functions would be meretricious. Postal Service management now regularly makes a number of such distinctions. We have pointed out that USPS



management routinely differentiates between "postal" and "non-postal" services in its efforts to avoid or minimize the impact of Postal Rate Commission review of its prices and classes of service in "competitive" – that is, non-mail – lines of commerce. Its management surely can distinguish between its mail services and other markets affected by mail services, faced with allegations that it is attempting to leverage its monopoly into such related markets.

USPS's bold assertion on p. 28 of the Solicitor General's initial brief on the merits that "Congress has therefore entrusted the Postal Service with the responsibility for determining whether its operations are anticompetitive, and if so whether other public benefits nonetheless warrant its actions" must be given highly qualified meaning.

It is true that within the scope of its monopoly services, the USPS should weigh whether its actions may, as to their impact on other parties, have anticompetitive consequences. But we can see no support in legislative history, in logic, or in sound public policy for extending such an assertion to mean that the Congress has given the USPS a warrant to determine whether and how it will extend its monopoly to restrain competition in markets related to mail delivery but not within its central scope, or freely to engage in anticompetitive conduct in lines of commerce other than mail service.

In mandating that the USPS operate more as a business, Congress was successful in endowing the USPS with a profound proprietary instinct. That instinct should not be allowed the sovereign, indeed imperial, and unchecked, scope which the USPS advocates.

## CONCLUSION

If and as this Court addresses the broad issues posed on appeal of the Ninth Circuit ruling, rather than disposing of the claim of Flamingo Industries on grounds particular to it, PostalWatch, as *Amicus Curiae*, respectfully urges the Court to affirm the holding of the Circuit Court below, to the effect that the scope of any immunity of the antitrust laws as may be accorded the USPS be limited to "conduct based immunity" related to the necessities of its specific mandates to deliver mail, that the USPS not be allowed to extrapolate its specific authorities so as to prejudice competition in markets related to mail delivery in contravention of the provisions of the antitrust laws, and that it not be permitted to conduct extensive and expanding commercial undertakings without the checks of the competitive policies embodied in the antitrust laws.

Respectfully submitted,

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